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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

FRIENDS OF THE RIVER,
Plaintiff,
v.
NATIONAL MARINE FISHERIES
SERVICE, et al.,
Defendants.

No. 2:16-cv-00818-JAM-EFB

**ORDER DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT, GRANTING
FEDERAL DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, AND GRANTING
INTERVENOR'S MOTION FOR SUMMARY
JUDGMENT**

I. INTRODUCTION

This litigation concerns three species of threatened fish and two federally-managed dams in the Yuba River. Friends of the River ("Plaintiff" or "FOR") sued the United States Army Corps of Engineers (the "Corps") and National Marine Fisheries Service ("NMFS") (collectively, "Federal Defendants") alleging violations of the Endangered Species Act and Administrative Procedures Act. Yuba County Water Agency ("YCWA" or "Intervenor") intervened in

1 the case. ECF No. 16. Parties filed cross-motions for summary
2 judgment, ECF Nos. 33, 38, 41, which were followed by opposition
3 and reply briefs, ECF Nos. 49, 54, 57. For the reasons set forth
4 below, the Court DENIES Plaintiff's motion, GRANTS Federal
5 Defendants' motion, and GRANTS Intervenor's motion.

7 II. BACKGROUND

8 A. Endangered Species Act

9 The Endangered Species Act of 1973 (ESA) "reflects a
10 conscious decision by Congress to give endangered species
11 priority over the primary missions of federal agencies."
12 W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 495 (9th
13 Cir. 2011) (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180
14 (1978) ("TVA v. Hill") (internal quotations marks omitted)). The
15 ESA tasks federal agencies with ensuring that any "agency action"
16 is not likely to jeopardize the continued existence of any listed
17 species. 16 U.S.C. § 1536(a)(2). Further, agency action may not
18 destroy or adversely modify the critical habitat of any listed
19 species. Id.

20 Agency actions that "may affect" a listed species require
21 the acting agency to formally consult with the federal agency
22 responsible for protecting that species. 50 C.F.R. § 402.14(a);
23 Grand Canyon Tr. v. U.S. Bureau of Reclamation, 691 F.3d 1008,
24 1011-12 (9th Cir. 2012), as amended (Sept. 17, 2012). If a
25 listed species is present in the area of a proposed action, the
26 acting agency—here, the Corps—must conduct a biological
27 assessment ("BA"), "for the purpose of identifying any endangered
28 species or threatened species which is likely to be affected by

1 such action." 16 U.S.C. § 1536(c).

2 At the end of the formal consultation process, the Secretary
3 of the consulting agency—here, NMFS—must issue a Biological
4 Opinion ("BiOp"). Id. § 1536(b)(3)(A). A BiOp is a "written
5 statement setting forth the Secretary's opinion, and a summary of
6 the information on which the opinion is based, detailing how the
7 agency action affects the species or its critical habitat." Id.
8 If the consulting agency believes that the project will
9 jeopardize a listed species or adversely modify the species'
10 habitat, "the Secretary shall suggest those reasonable and
11 prudent alternatives which he believes would not violate
12 subsection (a)(2) and can be taken by the Federal agency or
13 applicant in implementing the agency action." Id.

14 The ESA also prohibits any federal agency from "taking" a
15 listed species. 16 U.S.C. § 1538(a)(1)(B). "Take" is defined as
16 meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap,
17 capture, or collect, or to attempt to engage in any such
18 conduct." 16 U.S.C. § 1532(19). Where a taking is incidental
19 to, rather than the purpose of, a federal action, it is referred
20 to as an incidental take. 16 U.S.C. § 1536(b)(4); 50 C.F.R.
21 § 17.3. An incidental take may be permitted if the consulting
22 agency issues the acting agency an incidental take statement
23 along with the BiOp. 50 C.F.R. § 402.14(i). If the acting
24 agency subsequently modifies the action "in a manner that causes
25 an effect to the listed species or critical habitat that was not
26 considered in the [BiOp]," or if the acting agency exceeds the
27 take authorized in the incidental take statement, the agencies
28 must reinitiate formal consultation. 50 C.F.R. § 402.16.

1 **B. Administrative Procedure Act**

2 The Administrative Procedure Act (APA) provides for judicial
3 review of federal agencies' final actions. 5 U.S.C. § 702; see
4 also Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990).

5 "Agency decisions under ESA are governed by the [APA], which
6 requires an agency action to be upheld unless it is found to be
7 'arbitrary, capricious, an abuse of discretion, or otherwise not
8 in accordance with law.'" Defs. of Wildlife v. Zinke, 856 F.3d

9 1248, 1256-57 (9th Cir. 2017) (quoting Pac. Coast Fed'n of

10 Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv., 265

11 F.3d 1028, 1034 (9th Cir. 2001); 5 U.S.C. § 706(2)(A)). A court

12 may find that an agency's action was arbitrary and capricious,

13 "only if the agency relied on factors Congress did not
14 intend it to consider, entirely failed to consider an
15 important aspect of the problem, or offered an
16 explanation that runs counter to the evidence before
the agency or is so implausible that it could not be
ascribed to a difference in view or the product of
agency expertise."

17 Id. at 1257 (quoting Conservation Cong. v. U.S. Forest Serv., 720

18 F.3d 1048, 1054 (9th Cir. 2013)). During this deferential

19 review, the court upholds the agency's action unless the agency

20 failed to consider relevant factors or did not articulate "a

21 rational connection between the facts found and the choices

22 made." Alaska Oil & Gas Ass'n v. Pritzker, 840 F.3d 671, 675-76

23 (9th Cir. 2016) (quoting Alaska Oil & Gas Ass'n v. Jewell, 815

24 F.3d 544, 554 (9th Cir. 2016)).

25 The same standard applies to both new agency policies and

26 changes to previous agency positions. Id. at 681. "An agency

27 must provide a reasoned explanation for adoption of its new

28 policy—including an acknowledgment that it is changing its

1 position and if appropriate, any new factual findings that may
2 inform that change—but it need not demonstrate that the new
3 policy is better than its prior policy.” Id. at 682.

4 **C. The Three Fish Species**

5 Central Valley spring-run Chinook salmon (“spring Chinook”),
6 Central Valley steelhead (“steelhead”), and the Southern Distinct
7 Population Segment of North American green sturgeon (“green
8 sturgeon”) are anadromous fish. Corps R. 532:42347–42458. Born
9 into freshwater, anadromous fish migrate to the ocean as
10 juveniles and return to freshwater as adults to spawn and die.

11 Habitat blockage by dams and the degradation and destruction
12 of habitat has decimated fish populations. Corps R. 532:42358.
13 Current populations are a fraction of their historical abundance.
14 Corps R. 532:42351, 42397, 42441. Due to these declines, NMFS
15 listed the spring Chinook, steelhead, and green sturgeon
16 (collectively, “the Listed Species”) as threatened under the ESA.
17 64 Fed. Reg. 50,394 (Sept. 16, 1999) (spring Chinook); 71 Fed.
18 Reg. 834 (Jan. 5, 2006) (steelhead); 71 Fed. Reg. 17,757 (April
19 7, 2006) (green sturgeon). The Yuba River makes up a portion of
20 the critical habitat for each of the Listed Species. 70 Fed.
21 Reg. 52,488 (Sept. 2, 2005) (spring Chinook, steelhead); 74 Fed.
22 Reg. 52300 (Oct. 9, 2009) (green sturgeon). Despite their listed
23 status, the three species continue to swim towards extinction.
24 See Corps R. 532:42631 (“The CV spring-run Chinook salmon ESU is
25 at moderate risk of extinction . . . [and] has worsened since the
26 last status review.”), 42634 (“The CCV steelhead DPS is at high
27 risk of extinction . . . and the extinction risk is
28 increasing.”), 42636 (“The green sturgeon southern population DPS

1 is at substantial risk of extinction”).

2 **D. The Englebright and Daguerre Point Dams**

3 The Yuba River is a Northern California river that flows
4 into the Sacramento and Feather Rivers. State of Cal. ex rel.
5 State Land Comm’n v. Yuba Goldfields, Inc., 752 F.2d 393, 394
6 (9th Cir. 1985). Extensive gold mining efforts took place in the
7 region during the late nineteenth century. Id. One mining
8 technique in particular had “disastrous ramifications” for the
9 surrounding environment. Id. Hydraulic mining, by which miners
10 spray high-pressure water along hillsides to dislodge the desired
11 material, resulted in large deposits of debris into the Yuba
12 River and subsequent flooding to the surrounding area. Id. In
13 response to this problem, Congress enacted the Caminetti Act of
14 1893, 33 U.S.C. § 661 et seq. Id. The Caminetti Act created the
15 California Debris Commission, “a federal agency staffed by
16 members of the Army Corps of Engineers, which was empowered to
17 regulate and oversee hydraulic mining in the Sacramento and
18 Joaquin river systems within the State of California, 33 U.S.C.
19 § 663.” Id. The Caminetti Act sought to “(1) to permit
20 hydraulic mining under conditions that would preserve and protect
21 the navigable waters; and (2) to plan works to control the debris
22 and restore the rivers as navigable waterways, 33 U.S.C. §§ 664,
23 665, 685.” Id.

24 The California Debris Commission constructed Daguerre Point
25 Dam in 1906, diverting the river around it in 1910. Corps R.
26 532:42464-65. At only 24 feet high, the dam was originally
27 operated to retain mining debris and serves no flood control
28 purpose. Corps R. 532:42322. Daguerre Point Dam serves as a

1 partial to complete barrier in fish passage along the Yuba River.
2 Corps R. 532:42465. Some salmon and steelhead have been able to
3 surmount the dam since fish ladders were constructed in the early
4 1920s. Id. Green sturgeon are unable to use the fish ladders,
5 so Daguerre Point Dam completely blocks their upstream migration.
6 Corps R. 532:42606.

7 The River and Harbors Act of 1935, Pub. L. 409, 74th
8 Congress, approved August 30, 1935, 49 Stat. 1028, authorized
9 construction of public works in the Sacramento River and its
10 tributaries. Id. at 1038. A letter from the U.S. Army Chief of
11 Engineers recommended constructing a reservoir at Narrows in the
12 Yuba River to control debris. Corps R. 163:12663. The
13 construction of that project, named the Englebright Dam, was
14 completed in 1941. Corps R. 532:42530. Similar to the Daguerre
15 Point Dam, the dam was not built for flood control. Id.
16 Releases from the Englebright Dam are made through the Narrows I
17 and II hydroelectric power facilities. Corps R. 532:42321.

18 The Fish and Wildlife Coordination Act, enacted in 1934,
19 required consultation with the Bureau of Fisheries to prevent
20 loss and damage to wildlife before constructing a water
21 impoundment like Englebright Dam. See 16 U.S.C. § 662(a). There
22 is no evidence that Englebright Dam complied with the Fish and
23 Wildlife Coordination Act. Corps R. 389:29666. As it now
24 stands, the 260-foot-high dam lacks fish ladders and completely
25 blocks fish passage and access to historical spawning habitat.
26 Corps. R 532:42526.

27 **E. Procedural History**

28 This case is one in a series of cases regarding the impact

1 of dams, hydropower facilities, and water diversions on Listed
2 Species within the Yuba River. There are three prior cases
3 within this district. See S. Yuba River v. Nat'l Marine, et al.,
4 No. 2:00-cv-01410-DFL-PAN (E.D. Cal. Aug. 17, 2001) (Levi, J.)
5 (seeking an order requiring NMFS to issue proposed and final
6 rules pursuant to § 4(d) of the ESA for spring run chinook);
7 S. Yuba River Citizens League et al v. Nat'l Marine Fisheries
8 Serv., et al., No. 2:06-cv-02845-LKK-JFM (E.D. Cal Aug. 26, 2014)
9 (Karlton, J.) (challenging the propriety of a NMFS BiOp in
10 connection with the continued operation of two Corps dams on the
11 Yuba River); S. Yuba River Citizens League v. Nat'l Marine
12 Fisheries Serv., et al., No. 2:13-cv-00059-MCE-EFB (E.D. Cal.
13 Dec. 23, 2015) (England, J.) (requesting NMFS set aside
14 extensions to 2012 BiOp deadlines).

15 The first consultation between the Corps and NMFS regarding
16 Yuba River activities occurred around 2000, in response to a
17 lawsuit brought by the South Yuba River Citizens League (SYRCL).
18 Corps R. 356:23031. That year, the Corps requested formal
19 consultation with NMFS in a BA regarding the impact of
20 Englebright and Daguerre Point Dams and water diversions on
21 spring Chinook and steelhead. Corps R. 171:12759. In 2002, NMFS
22 issued a BiOp finding that the dams' operations were not likely
23 to jeopardize the continued existence of the spring Chinook and
24 steelhead or destroy or adversely modify designated critical
25 habitat. Corps R. 356:23066. According to the 2002 BiOp, "[t]he
26 proposed action . . . is the continuation of current Corps
27 operations of Englebright and Daguerre Point Dams," and "[a]n
28 important component of the Corps operations is the issuance of

1 permits, licenses and easements to non-federal entities for their
2 operations of water diversion facilities at or near the dams."
3 Corps R. 356:23033.

4 The Corps's 2007 BA similarly defined the agency action as
5 the "continuation of current Corps operations associated with
6 Englebright and Daguerre Point Dams on the Yuba River" with
7 respect to its impact on spring Chinook, steelhead, and green
8 sturgeon. Corps R. 178:13641-42. In the 2007 final BiOp, NMFS
9 again determined that the agency action was not likely to
10 jeopardize the List Species, but found a likelihood of incidental
11 take. Corps R. 368:24749.

12 In 2012, the Corps prepared a BA that defined the agency's
13 action differently. Relying on the 1998 FWS and NMFS ESA
14 Consultation Handbook, the Corps determined that the future
15 effects of the dams' presence should be included in the
16 environmental baseline. Corps R. 186:14185. The Corps made this
17 finding based on the argument that the agency did not have the
18 authority to change the presence of these preexisting facilities.
19 Id. at 186:14185-86. NMFS concluded in its 2012 BiOp that the
20 Corps's proposed actions, including those the Corps believed were
21 nondiscretionary, were likely to jeopardize the listed species.
22 Corps R. 389:29663. NMFS also provided reasonable and prudent
23 alternatives to avoid jeopardizing the Listed Species. Corps R.
24 389:29664.

25 The Corps had "serious concerns" regarding the 2012 BiOp and
26 sought to reinitiate consultation based on "new information."
27 Corps R. 544:43422. In 2013, the Corps reasserted its argument
28 that the dams' continued existence was not an agency action

1 because it was non-discretionary. Corps R. 81:4074. The Corps
2 also broke up what it previously considered one "agency action"
3 along the Yuba River into multiple smaller parts, separating
4 actions connected with the Englebright Dam, Daguerre Point Dam,
5 and licensing. Corps R. 80:4030. The Corps postponed
6 consultation on outgrants for the Narrows I and II and an
7 easement for the Brophy diversion to a later date. Corps R.
8 81:4095-96. The 2013 Daguerre Point BA sought formal
9 consultation, while the 2013 Englebright BA sought only informal
10 consultation. Corps R. 81:4053.

11 In May 2014, NMFS changed course from its prior opinion in
12 the 2012 BiOp. Corps R. 532, 581. In its 2014 Englebright
13 Letter of Concurrence ("Letter of Concurrence"), the agency
14 agreed that the Corps's proposed action at Englebright was not
15 likely to adversely affect the Listed Species. Corps R.
16 581:48897. Similarly, in the 2014 Daguerre Point Dam BiOp ("2014
17 BiOp"), NMFS concluded that the Corps's proposed action at
18 Daguerre Point was not likely to jeopardize the Listed Species.
19 Corps R. 532:42637.

20 Plaintiff brought this suit against NMFS and the Corps, as
21 well as the Bureau of Land Management ("BLM"), in April 2016.
22 ECF No. 1. The parties stipulated to dismiss BLM from the case
23 in November 2016. Order, ECF No. 24. In its Amended Complaint,
24 Plaintiff seeks declaratory and injunctive relief. Am. Compl. at
25 4, ¶ 11.

26 Plaintiff alleges nine causes of action in its Amended
27 Complaint: one APA claim against the Corps for issuing the 2013
28 Englebright BA (Count I); four APA claims against NMFS for

1 concurring with the Englebright BA (Count II), issuing the 2014
2 BiOp (Count III), rescinding the 2012 BiOp (Count IV), and
3 failing to reinitiate consultation with the Corps (Count IX); and
4 four ESA claims against the Corps for inadequate consultation
5 with NMFS (Count V), jeopardizing the Listed Species (Count VI),
6 taking the Listed Species (Count VII), and failing to reinitiate
7 consultation with NMFS (Count VIII). Am. Compl. at 26-38, ¶¶ 96-
8 146.

9 Following the submission of cross-motions on summary
10 judgment, Plaintiff moved to strike portions of Federal
11 Defendants' Statements of Facts. Mot. Strike II, ECF No. 56.
12 Arguments on the summary judgment motions and the Motion to
13 Strike were heard at oral argument on November 21, 2017. Minute
14 Order, ECF No. 61.

15 16 **III. STANDARD OF REVIEW**

17 The parties have filed cross-motions for summary judgment.
18 Summary judgment is the appropriate mechanism for deciding, as a
19 matter of law, whether the administrative record supports the
20 agency action and whether that action is otherwise consistent
21 with the APA standard of review. See Occidental Eng'g Co. v.
22 I.N.S., 753 F.2d 766, 769-70 (9th Cir. 1985).

23 Apart from the APA, the Court also grants deference to an
24 agency's interpretation of the statutes and regulations that
25 define the scope of its authority. Turtle Island Restoration
26 Network v. U.S. Dep't of Commerce, No. 13-17123, 2017 WL 6598627,
27 at *5 (9th Cir. Dec. 27, 2017) (citing Chevron, U.S.A., Inc. v.
28 Nat. Res. Def. Council, 467 U.S. 837, 843 (1984)). Chevron

1 deference only applies where the agency rendered decisions
2 through formal procedures. Id.

3 In the absence of those formal procedures, other types of
4 deference may still apply. Under Auer deference, the Court
5 “defer[s] to an agency’s interpretation of its own ambiguous
6 regulations, which controls unless ‘plainly erroneous or
7 inconsistent with the regulation,’ or where there are grounds to
8 believe that the interpretation ‘does not reflect the agency’s
9 fair and considered judgment of the matter in question.’” Id.
10 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142,
11 (2012)). Auer deference does not apply to an agency’s
12 interpretation of its own regulation that is inconsistent with
13 the statute under which the agency promulgated the regulations.
14 Marsh v. J. Alexander’s LLC, 869 F.3d 1108, 1117 (9th Cir. 2017).

15 Where an agency’s construction of a statute or regulation
16 does not qualify for either Chevron or Auer deference, the Court
17 may still give some deference to the agency’s decision.
18 Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952-53 (9th
19 Cir. 2009) (citing Skidmore v. Swift & Co., 323 U.S. 134 (1944);
20 United States v. Mead Corp., 533 U.S. 218, 228 (2001)). Under
21 Skidmore deference, the Court grants the agency’s interpretation
22 “a measure of deference proportional to the thoroughness evident
23 in its consideration, the validity of its reasoning, its
24 consistency with earlier and later pronouncements, and all those
25 factors which give it power to persuade.” Marsh, 869 F.3d at
26 1117 (quoting Indep. Training & Apprenticeship Program v. Cal.
27 Dep’t of Indus. Relations, 730 F.3d 1024, 1036 (9th Cir. 2013)).
28

1 IV. OPINION

2 A. Standing

3 As an initial matter, Federal Defendants have not disputed
4 that Plaintiff, an environmental organization, has standing in
5 this case.

6 The only party whose standing has been challenged is
7 Intervenor, by Plaintiff in its Reply Brief. FOR Reply, ECF No.
8 54, pp. 2-4. Plaintiff challenged Intervenor's standing to
9 advance the arguments made in Intervenor's Motion for Summary
10 Judgment. Id. The Court addressed the issue of overlapping
11 arguments between Federal Defendants and Intervenor in an order
12 granting in part and denying in part Plaintiff's Motion to Strike
13 Intervenor's Memorandum of Points and Authorities. See Strike
14 Order, ECF No. 48.

15 Earlier in this case, the Court granted Intervenor's
16 unopposed Motion to Intervene as a matter of right. Intervention
17 Order, ECF No. 18. Plaintiff did not oppose that motion. See
18 Mot. to Intervene, ECF No. 16, p. 1. Accordingly, Plaintiff has
19 waived any arguments against Intervenor's standing.

20 B. Motion to Strike

21 Plaintiff filed a motion to strike the legal arguments
22 Federal Defendants inserted into their Statements of Undisputed
23 Facts. See Mot. to Strike II. For the reasons stated on the
24 record at the November 21, 2017 hearing, the Court granted
25 Plaintiff's motion to strike with respect to the legal arguments
26 within Federal Defendants' Statements of Facts.

27 The Court treats Federal Defendants' additional objections
28 as factual disputes. Neither Plaintiff's nor the Federal

1 Defendants' statements at oral argument were of help to the
2 Court, as neither party disputes that the Court need not make
3 findings of fact.

4 C. Scope of Review

5 Plaintiff seeks to rely on evidence outside the
6 administrative record to support its claims. FOR Opp'n, ECF No.
7 49, p. 1. Federal Defendants counter that the scope of review is
8 limited to the administrative record for both APA and ESA claims.
9 Joint Reply, ECF No. 59, p. 1.

10 In the Ninth Circuit, claims brought under the ESA's citizen
11 suit provision are not subject to the same scope of review
12 restrictions as claims brought under the APA. Kraayenbrink, 632
13 F.3d at 497 ("Therefore, under Washington Toxics Coalition we may
14 consider evidence outside the administrative record for the
15 limited purposes of reviewing Plaintiffs' ESA claim."). Federal
16 Defendants argue that Kraayenbrink was a "passing and
17 unprecedented abrogation of the APA," which "flout[ed] decades of
18 Circuit and Supreme Court law."¹ Joint Reply at 1. In the seven
19 years since Kraayenbrink was published, the Ninth Circuit has not

20
21 ¹ As in previous cases, Federal Defendants conflate the standard
22 of review and scope of review for ESA claims. The "standard of
23 review" is governed by the APA, see Karuk Tribe, 681 F.3d at
24 1017; however, scope of review has been interpreted differently.
25 Federal courts have found "where a claim is brought under [the
26 ESA], the district court "borrow[s] ... the standard [of review]
27 from the APA," but does "not similarly borrow[] the APA's scope
28 of review." Ellis v. Housenger, No. C-13-1266 MMC, 2015 WL
3660079, at *4 (N.D. Cal. June 12, 2015) (quoting W. Watersheds
Project v. FWS, 2013 WL 3270363, at *4 (D. Id. June 26, 2013));
see also Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv., 230
F. Supp. 3d 1106, 1125 (N.D. Cal. 2017) (rejecting the argument
that Karuk Tribe implicitly or silently overruled Kraayenbrink
and admitting extra-record evidence on the plaintiffs' ESA
claim). Federal Defendants have not provided any authority
contesting this reasoning.

1 abrogated its holding on this issue.

2 Accordingly, the Court has limited its review to the record
3 on Plaintiff's APA claims and has considered extra-record
4 materials with regard to Plaintiff's ESA citizen-suit claims in
5 addition to the over 160,000 pages of the administrative record
6 provided by Federal Defendants.²

7 **D. Section 7 Consultation Duties**

8 Eight of Plaintiff's nine claims relate to Federal
9 Defendants' Section 7 consultation duties. In Claim I, Plaintiff
10 argues that the Corps's 2013 Englebright Dam BA violated the APA
11 because it (1) asserted that maintaining the Englebright Dam is
12 not an action subject to consultation; (2) found that the
13 Englebright Dam's maintenance was nondiscretionary; (3) denied
14 that adverse effects on the Listed Species and critical habitat
15 caused by Englebright Dam's existence were effects of the action;
16 and (4) segregated out permits, licenses, and easements into
17 separate future actions. Am. Compl. at 26-27, ¶¶ 96-99. In
18 Claim II, Plaintiff alleges that NMFS violated the APA by
19 concurring with the Corps's definition of the agency action and
20 conclusions in the 2013 Englebright Dam BA. Id. at 27-28,
21 ¶¶ 100-05. Claim III asserts that NMFS violated the APA in its
22 2014 BiOp by (1) adopting the Corps's definition of agency action
23 from the 2013 Daguerre Point Dam BA; (2) failing to analyze

24 _____
25 ² The parties violated the Court's status order. Status Order,
26 ECF No. 11. The Status Order unambiguously required the parties
27 to file motions on the issue of record supplementation by January
28 24, 2017, with briefing on the issue to conclude by February 21,
2017. Id. at 2. No such motions were filed, despite the
parties' abject failure to come to an agreement on the issue.
Nevertheless, the Court will not impose sanctions on the parties
for their noncompliance with the Status Order.

1 effects of the action on Listed Species by considering dam
2 existence to be part of the environmental baseline;
3 (3) insufficiently explaining its change of position from the
4 2012 BiOp; and (4) improperly defining the action area. Id. at
5 28-30, ¶¶ 106-10. In Claim IV, Plaintiff alleges that NMFS
6 violated the APA by replacing the 2012 BiOp with the 2014 BiOp.
7 Id. at 30, ¶¶ 111-13.

8 Claim V argues that the Corps violated its procedural duties
9 under ESA Section 7(a)(2) by failing to adequately consult with
10 NMFS about the Corps's Yuba River activities. Id. at 30-31,
11 ¶¶ 114-17. In Claim VI, Plaintiff asserts that the Corps
12 violated its substantive duty under ESA Section 7(a)(2) to ensure
13 its actions will not jeopardize the Listed Species because
14 (1) its consultations were inadequate and (2) new information
15 surfaced after NMFS issued the 2014 BiOp and Letter of
16 Concurrence. Id. at 31-32, ¶¶ 118-22. Claim VIII alleges the
17 Corps violated the ESA because the issuance of new scientific and
18 technical information has triggered the Corps's duty to
19 reinitiate consultation with NMFS. Id. at 34-36, ¶¶ 133-39.
20 Finally, Claim IX alleges NMFS violated the APA by failing to
21 reinitiate consultation with the Corps based on the same new
22 information in Claim VIII. Id. at 36-38, ¶¶ 140-46.

23 At the heart of Plaintiff's Section 7 claims lies a dispute
24 over the scope and definition of the Corps's agency action.
25 According to Plaintiff, Federal Defendants improperly defined,
26 narrowed, segmented, and analyzed the present action in a manner
27 that differed from their previous interpretations. See Am.
28 Compl. at 26-29, ¶¶ 97, 107. Federal Defendants counter that the

1 more recent interpretation is consistent with prior documents,
2 and also that a change in analysis would be permissible so long
3 as it is accompanied by an explanation. Fed. Def. MSJ, ECF No.
4 39, p. 23.

5 To weigh the parties' arguments, the Court considers
6 Plaintiff's numerous challenges presented individually. First,
7 the Court resolves whether the Corps's 2013 Englebright BA may be
8 subject to judicial review. Second, the Court examines what
9 actions fall within the environmental baseline, separate from the
10 present agency action. Third, the Court determines whether the
11 Corps's activities fit the ESA's broad definition of agency
12 action. Within this inquiry, the Court explores whether the
13 Corps's activities are (i) affirmative and (ii) discretionary
14 actions that are (iii) guaranteed to occur and (iv) include
15 interrelated and interdependent activities. Fourth, the Court
16 considers whether Federal Defendants properly determined the
17 scope of the action area in the 2013 and 2014 documents. Fifth,
18 the Court reviews the sufficiency of the consultation between the
19 Federal Defendants, including whether (i) NMFS has a duty to
20 reidentify the agency action; (ii) the agency action at
21 Englebright required formal consultation; and (iii) the Corps
22 violated its duty to ensure against jeopardy. Sixth, the Court
23 examines whether any changes in position by Federal Defendants
24 were adequately explained. Seventh, the Court evaluates whether
25 Federal Defendants had a duty to reinitiate consultation.

26 ///

27 ///

28 ///

1 **1. The Court May Review the Englebright Biological**
2 **Assessment**

3 Section 704 of the APA provides that "final agency action
4 for which there is no other adequate remedy in a court" is
5 subject to judicial review. 5 U.S.C. § 704. Although BAs
6 generally do not qualify as "final agency actions," a district
7 court "may review a BA where a final agency action, like a
8 [letter of concurrence], expressly relies on it to conclude
9 further action is not necessary." Oregon Wild v. U.S. Forest
10 Serv., 193 F. Supp. 3d 1156, 1164 (D. Or. 2016) (summarizing that
11 an agency action is "final" when it "mark[s] the consummation of
12 the agency's decisionmaking process" and determines "rights or
13 obligations").

14 Here, NMFS's Letter of Concurrence expressly relied upon the
15 findings of the Corps's 2013 Englebright BA to find that the
16 action was not likely to adversely impact the Listed Species.
17 Corps R. 581:48881-99. No formal consultation or BiOp took place
18 because of reliance on the BA's determinations and information.
19 While the Letter of Concurrence constitutes the final agency
20 action, the Court is unable to meaningfully analyze it without
21 referencing the BA upon which it was based. So the Court
22 considers the Corps's 2013 Englebright BA to be a final agency
23 action, reviewable under the APA.

24 **2. Federal Defendants Properly Delineated the Agency**
25 **Action from the Environmental Baseline**

26 The "agency action" is defined as "all activities or
27 programs of any kind authorized, funded, or carried out, in whole
28 or in part, by Federal agencies in the United States or upon the

1 high seas." 50 C.F.R. § 402.02. Distinct from the agency action
2 is the "environmental baseline," to which effects of the agency
3 action are added. 50 C.F.R. § 402.02. The environmental
4 baseline includes "the past and present impacts of all Federal,
5 State or private actions and other human activities in the action
6 area" and "the anticipated impacts of all proposed Federal
7 projects in the action area that have already undergone formal or
8 early section 7 consultation." Id. "[W]here baseline conditions
9 already jeopardize a species, an agency may not take action that
10 deepens the jeopardy by causing additional harm." Nat'l Wildlife
11 Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 930 (9th
12 Cir. 2008).

13 In evaluating the environmental baseline in National
14 Wildlife Federation, the Ninth Circuit found that current
15 existence of dams constituted an "existing human activity." 524
16 F.3d at 930-31. Operation of those dams—generating power by
17 running river water through the dams' turbines—constituted an
18 agency action for which the federal defendants had discretion
19 under the ESA and Northwest Power Act, 16 U.S.C. § 839. Id. at
20 931. There, like here, dam construction was not part of the
21 present agency action. Decades before the ESA's enactment, the
22 California Debris Commission "authorized, funded, or carried out"
23 construction of Englebright and Daguerre Point Dams, such that
24 the past and present impacts flowing from the dams' existences
25 fall within the definition of "environmental baseline." 16
26 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. Effects of the agency
27 action and other interrelated and interdependent activities are
28 to be added to this environmental baseline when considering

1 whether the action will jeopardize the Listed Species.

2 The Court finds that Federal Defendants provided a
3 satisfactory and thorough explanation for their actions and
4 therefore did not act arbitrarily or capriciously by properly
5 including effects of the dams' existences in the environmental
6 baseline.

7 **3. Federal Defendants' Identification of the Agency**
8 **Action Was Not Arbitrary or Capricious**

9 **a. A Present and Affirmative Action**

10 The Court construes the term "agency action" broadly. Karuk
11 Tribe of Cal. v. U.S. Forest Serv., 681 F.3d 1006, 1021 (9th Cir.
12 2012) (listing cases). There is a two-step inquiry to determine
13 whether an activity constitutes an agency action under the ESA.
14 Ctr. for Biological Diversity v. U.S. Env'tl. Prot. Agency, 847
15 F.3d 1075, 1090 (9th Cir. 2017) ("CBD v. U.S. EPA"). First, the
16 Court looks to "whether a federal agency affirmatively
17 authorized, funded, or carried out the underlying activity."
18 Karuk Tribe, 681 F.3d at 1021. Second, the Court determines
19 "whether the agency had some discretion to influence or change
20 the activity for the benefit of a protected species." Id.

21 "An agency must consult under Section 7 only when it makes
22 an 'affirmative' act or authorization." Id. One such example of
23 an affirmative agency action was the construction and operation
24 of a federal dam. Id. (citing TVA v. Hill, 437 U.S. at 173-74).
25 In TVA v. Hill, the Supreme Court found that the proposed
26 operation of the Tellico Dam, which had never opened, was an
27 affirmative action that would eradicate an endangered species.
28 Id. Similarly, the Ninth Circuit has held that hydropower

1 operations at over a dozen federal dams on the Columbia River
2 constituted an agency action. Nat'l Wildlife Fed'n, 524 F.3d at
3 923. Other affirmative actions include pesticide product
4 registration, Wash. Toxics Coal. v. Env'tl. Prot. Agency, 413 F.3d
5 1024, 1033 (9th Cir. 2005), and reregistration, CBD v. U.S. EPA,
6 847 F.3d at 1091; approval of oil spill response plans, Alaska
7 Wilderness League v. Jewell, 788 F.3d 1212 (9th Cir. 2015);
8 approval of Notices of Intent to conduct mining activity, Karuk
9 Tribe, 681 F.3d at 1021; and renewal of water supply contracts,
10 Nat. Res. Def. Council v. Jewell, 749 F.3d 776, 780 (9th Cir.
11 2014) ("NRDC v. Jewell").

12 Conversely, the Ninth Circuit has found that a failure to
13 act does not require consultation under Section 7(a)(2). W.
14 Watersheds Project v. Matejko, 468 F.3d 1099, 1107-08 (9th Cir.
15 2006) ("Of particular significance is the affirmative nature of
16 these words—'authorized, funded, carried'—and the absence of a
17 'failure to act' from this list."). The Ninth Circuit also
18 concluded that a private party's ongoing operation of a
19 hydropower project, pursuant to an earlier approved permit, was
20 not an affirmative act by the federal agency. Cal. Sportfishing
21 Prot. All. v. F.E.R.C., 472 F.3d 593, 598 (9th Cir. 2006).
22 Likewise, the Ninth Circuit found that an agency's failure to
23 regulate private parties' water diversions pursuant to those
24 parties' pre-existing rights-of-way was not an agency action.
25 Matejko, 468 F.3d at 1107-08.

26 Plaintiff asserts that the Corps's affirmative actions
27 consisted of (1) the dams' operations and maintenance and (2)
28 operation of ancillary facilities near the dams. Here, the

1 present operations described by the Corps for Englebright Dam
2 include visual security and safety inspections, maintenance of
3 recreational facilities, continued administration of maintenance
4 service contracts, and continued administration of outgrants.
5 Corps R. 581:48882-83. The Corps wrote that operation of
6 outgrants associated with the Englebright Dam hydropower
7 facilities were future actions for which the Federal Energy
8 Regulatory Commission would consult in 2016 and 2023. Corps R.
9 581:48882. At Daguerre Point Dam, the Corps described its
10 present operations as operating and maintaining the fish passage
11 facilities, maintaining a staff gage, administering licenses for
12 observing fish and installing flashboards, and conservation
13 measures. Corps R. 532:42332-33.

14 The activities listed by the Corps as actions in the
15 Englebright and Daguerre Point Dams BAs constitute activities
16 affirmatively carried out by a federal agency. 50 C.F.R.
17 § 402.02. Plaintiff has not identified any other specific
18 actions the Corps has "affirmatively authorized, funded, or
19 carried out" without consulting with NMFS. See CBD v. U.S. EPA,
20 847 F.3d at 1090. Thus, the Court has evaluated whether the
21 Corps has discretion over only the activities it identified as
22 agency actions in its BAs.

23 **b. A Discretionary Action**

24 The Supreme Court has noted that an overly broad reading of
25 ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), would "cover[], in
26 effect, almost anything that an agency might do" and "partially
27 override every federal statute mandating agency action." Nat'l
28 Ass'n of Home Builders v. Defs. of Wildlife, 551 U.S. 644, 664

1 (2007). Accordingly, NMFS and FWS promulgated regulations
2 limiting the consultation requirement to discretionary agency
3 actions. 50 C.F.R. § 402.03 ("Section 7 and the requirements of
4 this part apply to all actions in which there is discretionary
5 Federal involvement or control."). These regulations require
6 consultation "so long as the federal agency has 'some discretion'
7 to take action for the benefit of a protected species." NRDC v.
8 Jewell, 749 F.3d at 780 (quoting Karuk Tribe, 681 F.3d at 1024).
9 This discretion arises when "an agency, acting in furtherance of
10 a broad Congressional mandate, chooses a course of action which
11 is not specifically mandated by Congress and which is not
12 specifically necessitated by the broad mandate." Nat'l Wildlife
13 Fed'n, 524 F.3d at 929.

14 Section 7 does not require consultation for actions "that an
15 agency is required by statute to undertake." NRDC v. Jewell, 749
16 F.3d at 780 (quoting Home Builders, 551 U.S. at 669). This lack
17 of discretion exists "only if another legal obligation makes it
18 impossible for the agency to exercise discretion for the
19 protected species' benefit." Id. at 784. "An agency 'cannot
20 escape its obligation to comply with the ESA merely because it is
21 bound to comply with another statute that has consistent,
22 complementary objectives.'" Karuk Tribe, 681 F.3d at 1024
23 (quoting Wash. Toxics, 413 F.3d at 1032).

24 The Ninth Circuit has considered the discretionary nature of
25 actions several times since the Supreme Court's Home Builders
26 decision. In NRDC v. Jewell, the en banc panel found the agency
27 retained "some discretion" to act in a manner that would benefit
28 the delta smelt during renewal of water rights contracts. 749

1 F.3d at 785. Conversely, in Grand Canyon Trust, a statutory
2 requirement to prepare and submit an annual operating plan to
3 Congress each year was a "specific non-discretionary act," not
4 subject to consultation. 691 F.3d at 1018.

5 Here, where there are multiple dams that were authorized by
6 separate acts and built at different times, several sources of
7 legislative authority must be considered. The Corps cited nine
8 authorities that govern their discretion over the present
9 actions. Corps R. 81:4626-4639, 532:42326-27. Those authorities
10 are (1) The California Debris Act; (2) The Rivers and Harbors Act
11 of 1935; (3) Flood Control Act of 1970; (4) National Dam
12 Inspection Act of 1972; (5) Water Resources Development Act 1986;
13 (6) Water Resources Development Act 1996; (7) National Dam Safety
14 Program Act of 1996; (8) Public Law 109-460; and (9) Engineer
15 Regulation 1105-2-100. Id.

16 The California Debris Act, 33 U.S.C. § 661, et seq., created
17 a commission to restore navigability of rivers impacted by
18 hydraulic mining debris. One such authorized means of
19 ameliorating the impacts of mining was to construct debris-
20 restraining dams. 33 U.S.C. § 685. Similarly, the Rivers and
21 Harbors Act authorized and funded "construction, completion,
22 repair, and preservation" of structures to retain mining debris,
23 including the Daguerre Point Dam. Corps R. 81:4627-29.

24 The Flood Control Act of 1970, Section 216, authorizes the
25 Corps to review projects and report "to Congress with
26 recommendations on the advisability of modifying the structures
27 or their operation, and for improving the quality of the
28 environment in the overall public interest." 33 U.S.C. § 549a.

1 The Water Resources Development Act of 1986 and 1996 further
2 authorize the Corps to perform ecosystem restoration, subject to
3 certain limitations. 33 U.S.C. § 2283(b); 33 U.S.C.
4 § 2330(a)(1).

5 In the realm of dam safety, the National Dam Inspection Act,
6 Pub. L. 92-367 (Aug. 8, 1972) authorizes the Corps to carry out a
7 national program of inspection of non-Federal dams for the
8 purpose of protecting human life and property. The National Dam
9 Safety Program Act of 1996, Pub. L. 104-303 (Oct. 12, 1996),
10 amended in 2006, Pub. L. 109-460 (Dec. 22, 2006), goes further to
11 require Secretary of the Army to undertake a national dam
12 inspection program. 33 U.S.C. § 467d. The Engineering
13 Regulations require authorization by Congress when project
14 purposes are added or deleted. Corps R. 81:4635.

15 Plaintiff has identified several statutes that it believes
16 grant the Corps broad discretion to determine whether or how to
17 maintain the dams. FOR MSJ, ECF No. 33, pp. 11-12. Those
18 statutes describe the Corps's general duty to adopt plans that
19 improve river navigability, 33 U.S.C. § 664; ability to construct
20 sediment-impounding dams "when appropriations are made therefor
21 by law," 33 U.S.C. § 685; responsibility to include environmental
22 protection as one of its primary missions in operating and
23 maintaining water resources projects, 33 U.S.C. § 2316;
24 authorization to carry out a program to improve environmental
25 quality when feasible and consistent with the project's
26 authorized purpose, 33 U.S.C. § 2309a(a-b); capability to carry
27 out a project that improves the environment's quality and is cost
28 effective, including dam removal, 33 U.S.C. § 2330(a)(1-2); and

1 duty to mitigate fish and wildlife losses for projects
2 constructed after November 17, 1986, 33 U.S.C. § 2283.

3 The Court has carefully reviewed these sources and finds
4 that the Corps does not have the discretion to discontinue dam
5 inventory and safety inspections. The Corps properly classified
6 these actions as non-discretionary, which does not require
7 Section 7 consultation. See 50 CFR § 402.03; Home Builders, 551
8 U.S. at 666 (2007). The Corps also correctly identified that
9 remaining activities were discretionary. Corps R. 550:43451,
10 81:4560. In sum, Federal Defendants' assessment of the Corps's
11 discretion was not arbitrary or capricious.

12 **c. An Action Guaranteed to Occur**

13 In Claim III, Plaintiff further argues that it was improper
14 for NMFS to consider voluntary conservation measures, subject to
15 funding availability, as part of the agency action in the 2014
16 BiOp. Am. Compl. at 28-29, ¶ 107. Federal Defendants fail to
17 address this issue in their briefing.

18 The 2013 Daguerre Point Dam BA includes both "protective
19 conservation measures," which the Corps has committed to
20 incorporate into the Proposed Action, Corps R. 81:4518, and
21 "voluntary conservation measures," which are "subject to the
22 availability of funding." Corps R. 81:4522.

23 NMFS may rely on mitigation measures to support a finding
24 that an agency action poses no jeopardy to the Listed Species.
25 See Rock Creek All. v. U.S. Fish & Wildlife Serv., 663 F.3d 439,
26 444 (9th Cir. 2011). "[A] sincere general commitment" to future
27 mitigation, however, may not be included as part of a proposed
28 action unless there are "specific and binding plans" for

1 implementation. Nat'l Wildlife Fed'n, 524 F.3d at 935-36. In
2 the present case, the Corps's voluntary conservation measures
3 lack solid guarantees that they will actually occur because they
4 are contingent on uncertain funding availability. Benefits of
5 these potential conservation measures should not have factored
6 into the BA and BiOp unless the Corps showed "clear, definite
7 commitment of resources" for them. Id. Judging from the record,
8 this commitment is lacking.

9 Where the allegedly defective mitigation measure was not the
10 primary reason for the agency's no-jeopardy finding, other courts
11 have declined to invalidate the BiOp. See Klamath-Siskiyou
12 Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin., 99 F. Supp.
13 3d 1033, 1055-56 (N.D. Cal. 2015) (listing cases).

14 Similar to Klamath-Siskiyou Wildlands Center, the facts here
15 are distinguishable from National Wildlife Federation. 524 F.3d
16 at 935-36. There, the Ninth Circuit found NMFS "relied
17 significantly on [the] future [mitigation measures]" without
18 "specific and binding plans." Id. (emphasis added). Here, NMFS
19 did not rely on the voluntary mitigation measures as the primary
20 reason for its finding that the agency actions at Daguerre Point
21 Dam were not likely to result in jeopardy to the Listed Species.
22 Corps R. 532:42640. Reviewing the entirety of the 2014 BiOp, the
23 Court does not find that voluntary mitigation measures
24 constituted a critical or significant factor in NMFS's no-
25 jeopardy determination. Accordingly, the Court does not find the
26 no-jeopardy conclusions made in NMFS's 2014 BiOp biological
27 opinion to be arbitrary and capricious.

28 **d. Interrelated and Interdependent Activities**

1 Several of Plaintiff's claims take issue with the Corps's
2 exclusion of its issuance and administration of permits,
3 licenses, contracts, and easements from the proposed actions in
4 the 2013 BAs. Am. Compl., pp. 26-28, ¶¶ 97, 107. Plaintiff
5 argues that Federal Defendants acted arbitrarily and capriciously
6 by dividing up activities at Englebright, Daguerre, and the
7 Licensed Facilities into separate unrelated agency actions with
8 smaller action areas. FOR MSJ at 15. The Court disagrees.

9 While ESA regulations make clear that the Corps's issuance
10 of permits, licenses, contracts, and easements all qualify as
11 "actions" under the ESA. See 50 C.F.R. § 402.02 (providing that
12 "the granting of licenses, contracts, leases, easements, rights-
13 of-way, permits, or grants-in-aid" are examples of actions), the
14 question is whether it was improper for the Corps to classify
15 these activities as individual actions, rather than continuing
16 the Corps's previous practice of bundling these activities
17 together into a single action.

18 The ESA requires the consulting agency to consider the
19 "entire agency action." Conner v. Burford, 848 F.2d 1441, 1453
20 (9th Cir. 1988). The effects of the agency action include the
21 impact of "interrelated and interdependent" actions, defined as
22 actions "that are part of a larger action and depend on the
23 larger action for their justification" (interrelated) or actions
24 "that have no independent utility apart from the action under
25 consideration" (interdependent). 50 C.F.R. § 402.02. "The test
26 for interrelated or interdependent effects is 'but for'
27 causation, i.e., but for the proposed action, would the other
28 action occur." Nat. Res. Def. Council v. Rodgers, 381 F. Supp.

1 2d 1212, 1234-35 (E.D. Cal. 2005).

2 Segmented consultations of a single agency action are
3 counter to the ESA's requirements because an "agency action could
4 ultimately be divided into multiple small actions, none of which,
5 in and of themselves would cause jeopardy." Rodgers, 381 F.
6 Supp. 2d at 1237 n.43 (quoting Am. Rivers v. U.S. Army Corps of
7 Eng'r, 271 F. Supp. 2d 230, 255 (D.D.C. 2003)).

8 Plaintiff argues that the licenses and contracts are
9 interrelated because (1) the two dams were built as part of "an
10 integrated project" to control mining debris within the Yuba
11 River; (2) the Brophy Diversion depends on the existence of the
12 Daguerre dam for its head; (3) the Cordua Diversion is physically
13 attached to Daguerre; and (4) the Narrows 1 and 2 powerhouses
14 draw water from the Englebright Reservoir and their operations
15 are coordinated with the dam. FOR MSJ at 13-14. The Court finds
16 that these activities, however, do not form part of a larger
17 cohesive action. They do not meet the definitions of
18 interrelated or interdependent actions because they do not depend
19 on the presently proposed agency actions—outgrants, recreational
20 activities, and fish ladders—for their justification and have
21 independent utility apart from the proposed actions. See 50
22 C.F.R. § 402.02. "But for" the outgrants, recreational
23 activities, and fish ladder, activity at the Powerhouses and the
24 Cordua Diversion could still occur.³ See Ctr. for Biological
25 Diversity v. U.S. Fish & Wildlife Serv., 807 F.3d 1031, 1047 (9th

26
27 ³ The Corps's issuance of permits, licenses, contracts, and
28 easements similarly do not qualify as cumulative effects under
the ESA, as they would be future Federal, not State or private
activities. See 50 C.F.R. § 402.02.

1 Cir. 2015).

2 When renewed, these licenses and contracts will be their own
3 agency actions, subject to consultation requirements where the
4 agency yields discretion. Federal Defendants' exclusion of
5 activities from the 2013 Englebright BA and 2014 BiOp was not
6 arbitrary or capricious.

7 **4. Federal Defendants' Assessment of the Action Area**
8 **Was Not Arbitrary or Capricious**

9 In Claim III, Plaintiff asserts that NMFS violated the APA
10 by improperly identifying the "action area" within the 2014 BiOp.
11 Am. Compl. ¶ 109. Plaintiff contends that the smaller action
12 area in the BiOp failed to consider impacts from Englebright Dam
13 and Narrows 2 in its jeopardy and adverse modification analysis.
14 FOR MSJ at 15 n.10.

15 "Action area" is defined as "all areas to be affected
16 directly or indirectly by the Federal action and not merely the
17 immediate area involved in the action." 50 C.F.R. § 402.02.
18 Generally, "determination of the scope of an analysis area
19 requires application of scientific methodology and, as such, is
20 within the agency's discretion." Native Ecosystems Council v.
21 Dombeck, 304 F.3d 886, 902 (9th Cir. 2002). To withstand
22 judicial scrutiny, the agency must explain the "scientific
23 methodology, relevant facts, or rational connections linking the
24 project's potential impacts" to the action area boundaries. Id.

25 The ESA Consultation Handbook provides that the description
26 of the action area is a biological determination for which the
27 consulting agency—here, NMFS—is responsible. Corps R. 472:37064.
28 Although agreement between the Corps and NMFS is "desirable,"

1 id., NMFS's interpretation takes precedence where NMFS and the
2 Corps disagree.

3 The 2014 BiOp defines the action area as including "the
4 lower Yuba River starting at a point approximately 135 feet
5 upstream of the downstream of the Narrows II powerhouse and
6 approximately 415 feet downstream of Englebright Dam, downstream
7 to the confluence of the Yuba and Feather rivers." Corps R.
8 532:42345. The 2014 BiOp goes on to acknowledge that the Listed
9 Species may swim further upstream than the boundary of the action
10 area, up until the point when they are blocked by the Englebright
11 Dam. Id. The BiOp concludes that this area, upstream of the
12 action area boundary, would not be affected by the proposed
13 action. Id.

14 Although NMFS's action area determination could have been
15 more detailed, this "biological determination" qualifies as a
16 scientific judgment for which the Court must be "at its most
17 deferential." N. Plains Res. Council, Inc. v. Surface Transp.
18 Bd., 668 F.3d 1067, 1075 (9th Cir. 2011) (quoting Baltimore Gas &
19 Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103
20 (1983)). The 2014 BiOp's action area boundaries discussed
21 relevant facts and made a rational connection to the proposed
22 action's potential impact. See Native Ecosystems, 304 F.3d at
23 902. The Court does not find that NMFS acted arbitrarily and
24 capriciously in defining the action area in the 2014 BiOp.

25 ///

26 ///

27 ///

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1
2 **5. The Federal Defendants' Consultation Was**
3 **Sufficient**

4 **a. There Was No Duty To Reidentify the Agency**
5 **Action**

6 Plaintiff argues that NMFS abdicated its responsibility to
7 "correctly identify the action that is subject to consultation."
8 Am. Compl. at 28-29. Quoting from the ESA Consultation Handbook,
9 Plaintiff argues that NMFS need not agree with the Corps's
10 identification of the agency action or action area and must
11 instead make its own independent determination. FOR Opp'n at 4.

12 The statute and accompanying regulations are not clear about
13 the discretion that the consulting agency has to reidentify or
14 redefine the agency's proposed action. See 50 C.F.R. § 402.11(f)
15 (specifying that a preliminary BiOp can be confirmed as final
16 after the consulting agency "reviews the proposed action" and
17 finds no significant changes); 50 C.F.R. § 402.14(a) (requiring
18 both the action agency and consulting agency to initiate
19 consultation where any agency action that may affect listed
20 species or critical habitat is identified).

21 The ESA Consultation Handbook, to which the Court affords
22 Skidmore deference, San Luis & Delta-Mendota Water Auth. v.
23 Jewell, 747 F.3d 581, 634 (9th Cir. 2014), instructs the acting
24 agency to "[p]rovide descriptions of the proposed action and the
25 action area (area including all direct and indirect effects)."
26 Corps R. 472:37064. Where there is no complete or formal
27 description of the proposed action, the consulting agency
28 prepares a draft comprehensive project description, which is sent

1 to the action agency for review to eliminate inaccuracies. Id.
2 The Handbook goes on to provide that where the action agency and
3 consulting agency disagree on the action area, the consulting
4 agency's determination prevails on that biological determination.
5 Id. There was no similar distinction made for the proposed
6 action, where the language implies that the action agency has the
7 final say.

8 Based on the Handbook's language and the Court's deference
9 to it, the Court finds that NMFS did not act arbitrarily or
10 capriciously in accepting the Corps's identified agency action.
11 See Defs. of Wildlife v. U.S. Fish, No. 16-CV-01993-LHK, 2016 WL
12 4382604, at *18 (N.D. Cal. Aug. 17, 2016) (rejecting an argument
13 that FWS acted arbitrarily and capriciously by relying on the
14 Corps's description of its proposed project).

15 **b. The Agency Action at Englebright Is Not**
16 **Likely to Adversely Affect the Listed Species**

17 In several claims against Federal Defendants, Plaintiff
18 alleges that the agencies have improperly determined that the
19 proposed action at Englebright is not likely to adversely affect
20 the Listed Species and their critical habitat, and in doing so,
21 failed to engage in required formal consultation. Am. Compl. at
22 28, 31, ¶¶ 103, 116.

23 "If an agency determines that action it proposes to take may
24 adversely affect a listed species, it must engage in formal
25 consultation." Bennett v. Spear, 520 U.S. 154, 158 (1997).
26 Formal consultation is not required if preparation of a BA or
27 informal consultation determines that the proposed action is not
28 likely to adversely affect any listed species or critical

1 habitat. 50 C.F.R. § 402.14(b)(1). The agency's determination
2 on adverse effects will be upheld unless it "entirely fail[s] to
3 consider an important aspect of the problem," relied on improper
4 factors, or offers an implausible explanation. See Wild Fish
5 Conservancy v. Salazar, 628 F.3d 513, 529-30 (9th Cir. 2010)
6 (quoting The Lands Council v. McNair, 537 F.3d 981, 987 (9th Cir.
7 2008)).

8 As analyzed above, the Court has found that Federal
9 Defendants' identification of the proposed actions and the
10 Corps's discretion is not arbitrary and capricious. Review of
11 the 2013 Englebright Dam BA and Letter of Concurrence illustrates
12 that Federal Defendants thoroughly reviewed the proposed actions
13 during informal consultation and provided plausible explanations
14 for the finding that these actions were not likely to adversely
15 affect the Listed Species and their critical habitat. See Corps
16 R. 550:43461-69, 581:48884-86. Based on this finding, it was not
17 necessary for the agencies to engage in formal consultation for
18 this proposed action. See 50 C.F.R. § 402.14(b)(1). Federal
19 Defendants' finding that the proposed action at Englebright Dam
20 was not likely to adversely affect the Listed Species and their
21 critical habitat was not arbitrary and capricious.

22 **c. The Corps Did Not Violate Its Duty to Ensure**
23 **Against Jeopardy**

24 Plaintiff's Claim VI asserts that the Corps violated its
25 duty to ensure against jeopardy, in violation of Section 7(a)(2).
26 Am. Compl. at 31-32 ¶¶ 118-22. Plaintiff bases this claim on the
27 alleged insufficiency of the Letter of Concurrence and 2014 BiOp,
28 as well as "new information" about and a modification of the

1 actions. Id.

2 "Section 7 of the ESA imposes a substantive duty on the
3 [agency] to ensure that its actions are not likely to jeopardize
4 the continued existence of the listed fish or result in
5 destruction or adverse modification of critical habitat." Ctr.
6 for Biological Diversity v. U.S. Bureau of Land Mgmt., 698 F.3d
7 1101, 1127 (9th Cir. 2012) ("CBD v. U.S. BLM") (citing 16 U.S.C.
8 § 1536(a)(2)). When reviewing an agency's reliance on a BiOp,
9 the Court examines whether that reliance was arbitrary and
10 capricious. Aluminum Co. of Am. v. Adm'r, Bonneville Power
11 Admin., 175 F.3d 1156, 1162 (9th Cir. 1999). An agency's
12 reliance on "admittedly weak" information is not arbitrary or
13 capricious unless there is information the agency did not take
14 into account that undercuts its conclusions. Pyramid Lake Paiute
15 Tribe of Indians v. U.S. Dep't of Navy, 898 F.2d 1410, 1415 (9th
16 Cir. 1990).

17 Here, the Court has determined that the 2014 BiOp upon which
18 the Corps relied was not flawed, but rather evaluated the agency
19 action and scope of discretion in far greater detail than any of
20 the prior documents. This enhanced scrutiny resulted in NMFS
21 reaching different conclusions and recommendations than were made
22 in the 2012 BiOp. While the scientific information makes clear
23 that the baseline conditions jeopardize the Listed Species,
24 Plaintiff has not provided information that indicates the present
25 proposed actions increase that risk by causing additional harm.
26 See Nat'l Wildlife Fed'n, 524 F.3d at 930 ("Agency action can
27 only 'jeopardize' a species' existence if that agency action
28 causes some deterioration in the species' pre-action

1 condition.”).

2 The Court finds that the Corps did not violate its
3 substantive duty under Section 7(a)(2).

4 **6. The Explanation for Position Changes Was Adequate**

5 In Claim III, Plaintiff alleges that NMFS insufficiently
6 explained the changes in its reasoning between the 2012 BiOp and
7 2014 BiOp. Am. Compl. 29, ¶ 108.

8 As the Ninth Circuit recently noted in Defenders of
9 Wildlife, “[a]gencies are entitled to change their minds.” 856
10 F.3d at 1262 (quoting Butte Env'tl. Council v. U.S. Army Corps of
11 Eng'r, 620 F.3d 936, 946 (9th Cir. 2010)). That change must be
12 accompanied by “a satisfactory explanation for its action
13 including a rational connection between the facts found and the
14 choice made.” Humane Soc’y of U.S. v. Locke, 626 F.3d 1040, 1051
15 (9th Cir. 2010) (emphases and internal quotation marks omitted).
16 Where an agency dramatically changes its approach without a
17 rational explanation, its new interpretation is entitled to less
18 deference. Nat’l Wildlife Fed’n, 524 F.3d at 933.

19 The Corps has thoroughly explained the differences in its
20 reasoning from prior BAs. See Corps R. 81:4071-101, 550:43448-
21 51. Following the 2012 BiOp, the Corps “deconstructed its
22 proposed action to more clearly identify which activities were
23 subject to ‘discretionary Federal involvement or control’ ” and
24 which “were non-discretionary and would therefore not be included
25 in the Corps’ request for consultation.” Corps R. 581:48888-89.
26 The Corps then sought to reinitiate consultation with NMFS to
27 provide more accurate information on agency discretion, the
28 proposed action’s scope, and recent scientific and technical

1 findings. Corps R. 581:48889-90, 532:42324-25. Separate BAs on
2 the dams were submitted because the Corps found "each dam has a
3 separate authorization and appropriation, and because the actions
4 at Englebright and Daguerre are wholly separate and are not
5 dependent upon each other to operate." Corps R. 581:48890.

6 NMFS's description of its change in reasoning is less
7 detailed. For the most part, NMFS appears to adopt the Corps's
8 reasoning and reconsiders its prior BiOp based on this change:

9 In the 2012 BiOp, NMFS identified several additional
10 actions as interrelated and interdependent actions
11 associated with the project description in the Corps
12 2012 BA (Corps 2012a). Due to modifications in the
13 proposed action, and new information regarding Corps
14 discretion and authority, those actions are no longer
15 identified in this BiOp as interrelated and
16 interdependent actions.

17 Corps R. 532:42345. NMFS's explanation, albeit quite brief,
18 indicates that it examined the relevant data, made a rational
19 connection between the facts, and explained its change in
20 position from the 2012 BiOp to the 2014 BiOp and Letter of
21 Concurrence. The Court finds that NMFS's change in position was
22 not arbitrary or capricious.

23 **7. Reinitiation of Consultation Was Not Required**

24 Plaintiff's eighth and ninth claims allege that Federal
25 Defendants violated the ESA (Claim VIII) and APA (Claim IX) when
26 they failed to reinitiate consultation after the issuance of new
27 information. Am. Compl. at 34-38, ¶¶ 133-46.

28 "The ESA's implementing regulations require an action agency
to reinitiate formal consultation with the consulting agency when
'new information reveals effects of the action that may affect
listed species or critical habitat in a manner or to an extent

1 not previously considered' (the 'new information' reinitiation
2 trigger)." Def. of Wildlife, 856 F.3d at 1264-65 (citing 50
3 C.F.R. § 402.16(b)). Reinitiation is also required when an
4 identified action is subsequently modified in a manner the BiOp
5 did not consider. 50 C.F.R. § 402.16(c); see, e.g., Cottonwood
6 Envtl. Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1088 (9th
7 Cir. 2015), cert. denied, 137 S. Ct. 293 (2016) (holding that
8 FWS's expansion of critical habitat required the Forest Service
9 to reinitiate consultation). "However, 50 C.F.R. § 402.16 does
10 not require agencies to stop and reinitiate consultation for
11 'every modification of or uncertainty in a complex and lengthy
12 project.'" Conservation Cong. v. Finley, 774 F.3d 611, 619 (9th
13 Cir. 2014) (quoting Sierra Club v. Marsh, 816 F.2d 1376, 1388
14 (9th Cir. 1987)).

15 The Ninth Circuit has found reinitiation is appropriate
16 where a new critical habitat was designated, Cottonwood, 789 F.3d
17 at 1084-85; where promised conservation measures fail, CBD v.
18 U.S. BLM, 698 F.3d at 1115; and where future actions differ from
19 the BiOp assumptions, N. Alaska Env'tl. Ctr. v. Kempthorne, 457
20 F.3d 969, 981 (9th Cir. 2006). The Ninth Circuit has also
21 cautioned that new information must relate to the direct and
22 indirect effects of the agency action, excluding cumulative
23 effects of private and state activities. Sierra Club, 816 F.2d
24 at 1387.

25 Plaintiff believes that new studies and plans, such as the
26 Yuba River Ecosystem Restoration Reconnaissance Study and Habitat
27 Management and Restoration Plan, provide a basis upon which to
28 reinitiate consultation between the agencies. Am. Compl. at 35,

1 ¶¶ 136-37. While Plaintiff repeatedly states that the study and
2 plan provide "new information," at no point does Plaintiff
3 provide any guidance as to how that information details effects
4 not previously considered in the consultation. See 50 C.F.R.
5 § 402.16(b) (requiring reinitiation where "new information"
6 affects a species or habitat "in a manner or to an extent not
7 previously considered" (emphasis added)). The Court does not
8 read the regulations as requiring reinitiation of consultation
9 every time a relevant study is funded or published. As the Ninth
10 Circuit pointed out in Finley, a new study only requires
11 reinitiation of consultation where the original consultation
12 failed to address the effects described in the new information.
13 774 F.3d at 619-20 n.3 (affirming denial of a reinitiation claim
14 based on the publication of a recovery plan, containing "new"
15 studies drawn from old information). As Plaintiff has not
16 described what new effects the study and plan detail that the
17 Federal Defendants did not previously consider, these exhibits do
18 not provide cause for reinitiation.

19 As further evidence of new information, Plaintiff's motion
20 cites the declaration of a fisheries biologist who states that
21 the conservation measures in the 2014 BiOp have not improved
22 conditions for the Listed Species because the dams block
23 migration and populations of the Listed Species have continued to
24 decline. FOR MSJ at 22-23; Reedy Decl. ¶¶ 10, 14-20, 25; Ex. B,
25 C. The biologist also states that the large woody material
26 management program did not function as planned because materials
27 washed away during large storm events. Reedy Decl. ¶¶ 24-25, Ex.
28 F. High storm flows similarly closed the fish ladders in early

1 2017, months after Plaintiff filed its Amended Complaint. Reedy
2 Decl. ¶ 22, Ex. D.

3 The ESA requires a plaintiff to provide notice of a
4 violation at least sixty days prior to filing suit. 16 U.S.C.
5 § 1540(g)(2)(A)(i). The Supreme Court has concluded strict
6 compliance with citizen-suit timeliness and identification
7 requirements best serves the goal of the notice requirement.
8 Klamath-Siskiyou Wildlands Ctr. v. MacWhorter, 797 F.3d 645, 650
9 (9th Cir. 2015) (citing Gwaltney of Smithfield, Ltd. v.
10 Chesapeake Bay Found., Inc., 484 U.S. 49, 60 (1987)). Notice
11 should "at a minimum provide sufficient information so that the
12 notified parties could identify and attempt to abate the
13 violation." Id. (quoting Sw. Ctr. for Biological Diversity v.
14 U.S. Bureau of Reclamation, 143 F.3d 515, 522 (9th Cir. 1998)).

15 Here, many of the violations alleged in Plaintiff's Motion
16 for Summary Judgment arose not only after Plaintiff's notice to
17 Federal Defendants, but also after amendment of the complaint in
18 December 2016. Plaintiff's notice and reinitiation claims do not
19 adequately notify Federal Defendants of violations arising from
20 new circumstances like the storm events in 2017. Thus, these
21 events fail to provide cause to order Federal Defendants to
22 reinitiate consultation.

23 In conclusion, the Court grants summary judgment to Federal
24 Defendants and Intervenor on all claims arising under Section 7.
25 Claim I is denied because Plaintiff has not shown that the
26 Corps's 2013 Englebright Dam BA was arbitrary or capricious in
27 its assessment of the present proposed action, the Corps's
28 discretion, and adverse effects. Claim II is denied because

1 Plaintiff has not shown that NMFS was arbitrary or capricious in
2 concurring with the 2013 Englebright Dam BA. Claim III is denied
3 because Plaintiff failed to show that NMFS acted arbitrarily or
4 capriciously in its change of position and issuance of the 2014
5 BiOp. Claim IV is denied because Plaintiff has not shown NMFS's
6 replacement of the 2012 BiOp with the 2014 BiOp was arbitrary or
7 capricious. Claims V, VIII, and IX are denied because Plaintiff
8 failed to show that Federal Defendants consultation was
9 insufficient and that new information required Federal Defendants
10 to reinitiate consultation. Claim VI is denied because Plaintiff
11 did not show that the Corps violated its duty not to jeopardize
12 Listed Species.

13 **E. Section 9 Prohibition Against Authorized Taking**

14 Plaintiff also brings a takings claim under Section 9.
15 Plaintiff's Claim VII alleges that the Corps has violated ESA by
16 taking the Listed Species without authorization. Am. Compl. at
17 32-34, ¶¶ 123-32. Plaintiff argues that the taking results from
18 the continued existences of the two dams, as well as the fish
19 ladders at Daguerre Point Dam and introduction of invasive
20 species through recreational activities. Id. at 32-33, ¶ 124.

21 "All persons, including federal agencies, are specifically
22 instructed not to "take" endangered species." TVA, 437 U.S. at
23 184. The ESA defines "take" as "to harass, harm, pursue, hunt,
24 shoot, wound, kill, trap, capture, or collect, or to attempt to
25 collect, or to attempt to engage in any such conduct." 16 U.S.C.
26 § 1532(19). "Harm" includes significant habitat modification or
27 degradation that actually kills or injures wildlife. See Babbitt
28 v. Sweet Home Chapter of Cmty. for Great Or., 515 U.S. 687, 707-

1 09 (1995). Whether activities qualify as a "taking" under
2 Section 9 of the ESA is a distinct inquiry from whether they "may
3 affect" a species or its critical habitat under Section 7. Karuk
4 Tribe, 681 F.3d at 1028.

5 NMFS granted the Corps an incidental take statement for its
6 activities related to sediment removal, maintenance and debris
7 removal in the fish ladders, gravel augmentation, and woody
8 instream material management. Corps R. 532:42637-40. Should the
9 Corps exceed the amount or extent of taking specified in the
10 incidental take statement, the agencies must reinitiate
11 consultation. 50 C.F.R. § 402.16. Taking within the limits of
12 the incidental take statement, however, cannot constitute an
13 impermissible taking.

14 The main harms Plaintiff alleges, apart from those covered
15 by the incidental take statement, flow from the dams' existences.
16 The Court has already found Federal Defendants did not act
17 arbitrarily or capriciously in concluding that the dams'
18 existences do not constitute a present or continuing "agency
19 action." Even if the dams' existences did constitute an agency
20 action, this action appears to be outside the agency's
21 discretion. While the Ninth Circuit has not clearly spoken on
22 this issue, a similar case in this district found that an agency
23 cannot be liable where it has no discretion over the activities
24 resulting in the alleged taking. Nat. Res. Def. Council v.
25 Norton, 236 F. Supp. 3d 1198, 1239 (E.D. Cal. 2017).

26 Relying on the Supreme Court's reasoning in Home Builders,
27 Norton analogized to the holding in Department of Transportation.
28 v. Public Citizen, 541 U.S. 752 (2004) and found it inappropriate

1 to impose Section 9 liability on an agency performing a
2 nondiscretionary duty. 236 F. Supp. 3d at 1239. Contra Seattle
3 Audubon Soc'y v. Sutherland, No. C06-1608MJP, 2007 WL 1577756, at
4 *1 (W.D. Wash. May 30, 2007) (holding Public Citizen, as a NEPA
5 case, was inapposite to the plaintiff's ESA Section 9 claims,
6 without addressing the language in Home Builders). The Court
7 finds Norton's lengthy analysis of this issue, including
8 application of the broader principles from Public Citizen and
9 Home Builders, more persuasive than the reasoning articulated in
10 Seattle Audubon.

11 Because the Corps has not affirmatively engaged in a
12 discretionary activity that had prohibited impact on the Listed
13 Species, Plaintiff has not proven a violation of Section 9. See
14 Palila v. Hawaii Dep't of Land & Nat. Res., 639 F.2d 495, 497
15 (9th Cir. 1981).

16 V. CONCLUSION AND ORDER

17 For the reasons set forth above:

18 (1) Plaintiff's Motion for Summary Judgment is DENIED;

19 (2) Federal Defendants' Motion for Summary Judgment is
20 GRANTED; and

21 (3) Intervenor's Motion for Summary Judgment is GRANTED.

22 IT IS SO ORDERED.

23 Dated: February 21, 2018

24 
25 JOHN A. MENDEZ,
26 UNITED STATES DISTRICT JUDGE